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No. 17

# In the Supreme Court of the United States

OCTOBER TERM, 1961

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

J-T TRANSPORT COMPANY, INC., ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI—WESTERN DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI—WESTERN DIVISION*

## BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

### OPINIONS BELOW

The opinion of the district court (R. 160–179) is reported at 185 F. Supp. 838. The reports of the Interstate Commerce Commission are printed at 74 M.C.C. 324 (Division 1) (R. 22–27) and 79 M.C.C. 695 (entire Commission) (R. 29–52).[1]

[1] Each of these reports involved two motor carrier application proceedings, namely, Docket No. MC–11185 (Sub-No. 100), entitled *J–T Transport Co., Inc., Extension—Columbus, Ohio* and Docket No. MC–11185 (Sub-No. 102), entitled *J–T Transport Co., Inc., Extension—Indianapolis, Ind.* The Commission's orders in only the second, or Sub-No. 102 docket, are involved in this case.

## JURISDICTION

The judgment of the district court was entered on August 9, 1960 (R. 159). The Interstate Commerce Commission filed its notice of appeal on October 6, 1960 (R. 180–183), and probable jurisdiction was noted on February 20, 1961 (R. 186). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

## QUESTIONS PRESENTED

1. Whether, in passing upon an application for a contract carrier permit, the Interstate Commerce Commission is precluded by the 1957 amendments to sections 203(a)(15) and 209(b) of the Interstate Commerce Act from giving any consideration to an affirmative showing by a protesting common carrier that it is authorized, able and willing to provide a service adequate to fulfill the transportation requirements of the shipper supporting the application.

2. Whether, in determining "the effect which denying the permit would have upon the * * * shipper" as required by section 209(b), the Commission gave improper consideration to the willingness and ability of the protesting common carrier to perform the required service and failed to make adequate findings supported by substantial evidence.

3. Whether, in applying the statutory standard of consistency with the public interest and the national transportation policy and the criterion of "the effect which granting the permit would have upon the services of the protesting carriers", the Commission erred in concluding that granting the permit would be inimical to the preservation of sound economic con-

ditions in the transportation industry and would adversely affect the services of the protesting carrier by withdrawing potential traffic which the protesting carrier can handle adequately and should be given the opportunity to handle before additional authority is granted.

## STATUTES INVOLVED

The National Transportation Policy (54 Stat. 899, 49 U.S.C. preceding sections 1, 301, 901 and 1001); section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85–163, 85th Cong.); and section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411–412, Public Law 85–163, 85th Cong.) are set forth in the Appendix.

## STATEMENT

This is a direct appeal from the final judgment of a three-judge district court, setting aside an order of the Interstate Commerce Commission, entered on June 15, 1959, denying an application of J–T Transport Company for a contract carrier extension-of-service permit.

Prior to the Commission hearing held in this case on May 22, 1957, there had been issued to the appellee J–T Transport Company, Inc., of Kansas City, Missouri, sixteen different permits[2] as a contract carrier by

[2] Issued over the period from July 6, 1953, to January 17, 1957, in J–T's Dockets Nos. MC–11185, Sub-Nos. 37, 61, 64, 69, 72, 73, 76, 79, 80, 82, 84, 85, 91, 92, and 94 (Applicant's Exhibit No. 1 to the transcript of testimony, being part of Plaintiffs' Exhibit "A" received in evidence at the hearing on February 15, 1960, before the court below).

motor vehicle under section 209(b) of the Interstate Commerce Act, authorizing transportation by it of commodities described generally as uncrated aircraft components and assemblies, utilized by J–T for nine aircraft manufacturers, between various points in the United States, principally between certain points in Midwestern and Western States. By application filed on March 14, 1957, in J–T's Docket No. MC–11185 (Sub-No. 102), as amended on April 12, 1958, an extension-of-service permit was sought for operation as a contract carrier of "aircraft landing-gear bulkheads, uncrated, requiring special handling and special equipment because of their fragile nature," over irregular routes from Indianapolis, Ind., to Wichita, Kansas.

At the hearing held on this application, the Wichita Division of Boeing Airplane Company, consignee of the proposed traffic, supported the grant of the proposed permit. A manufacturer at Indianapolis, H & B American Machine Company, makes landing-gear bulkheads of outsize dimensions for Boeing, which the latter installs, upon delivery to it, in B–52 airplanes being manufactured at Wichita for the United States Air Force (R. 68, 79, 84). Until the grant of temporary authority on February 8, 1957,[3] to J–T, these bulkheads had been transported for about 20 months prior to that date from Indianapolis to Wichita by rail carriers, in returnable crates in flat cars (R. 87).

[3] The testimony was that the temporary authority was issued April 9, 1957 (R. 65, 76), but the Commission's records show that the correct date should be February 8, 1957.

U.S.A.C. Transport, Inc., of Detroit, Mich., one of the protestants against the grant of the application, is a motor common carrier which has held a certificate of public convenience and necessity from the Commission since January 18, 1950, in its Docket No. MC–108068 (Sub-No. 12), to transport, *inter alia*, "aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile nature," over irregular routes between points in the United States lying east of the Mississippi River and points lying west of that River, which authority would embrace the transportation from Indianapolis to Wichita proposed by appellee J–T (Ex. 16, R. 148, 150; R. 111–112). This protestant has specialized in serving the aircraft industry for many years (R. 111, 113, 117; Ex. 16, R. 148, 149).

Among its 18 terminals throughout the country, U.S.A.C. maintains one at Indianapolis, the origin point of the shipments of bulkheads, where its equipment has not been fully utilized (R. 112, 115–117). It has in the past modified its equipment and has tailored its service to meet the specific transportation requirements of aircraft manufacturers, and it would meet Boeing's requirements if it were offered the Indianapolis-Wichita traffic (R. 112–115, 117–119). Although Boeing knew of, and had previously used the authorized common carrier services of U.S.A.C., it did not request that carrier to supply equipment for the Indianapolis-to-Wichita movement (R. 101, 103, 104–105, 117). At the hearing, Boeing's witness testified that it had an unsatisfactory experience with a load hauled by U.S.A.C. in 1953, although he was

unable to say whether the damage incurred was the fault of the shipper or the carrier (R. 101). The examiner shut off cross examination for the reason that the incident was too remote—and U.S.A.C. has gone under new management since then (Ex. 16, R. 148, 149).

The hearing examiner recommended a grant of J-T's Sub 102 application. Following exceptions filed to that recommended report, and reply, the Commission's Division 1, on January 31, 1958, issued its report and order disapproving the examiner's recommendations and denying the Sub 102 application. Reconsideration and oral argument were denied by order of July 25, 1958, by the entire Commission. Upon J-T's second petition for reconsideration, the entire Commission, by order of October 16, 1958, reopened the Sub 102 proceeding for reconsideration and for the issuance of a further report and order. On June 15, 1959, the Commission issued its report on reconsideration and order, again denying the Sub 102 application.

On August 21, 1959, J-T instituted an action in the District Court to set aside the reports and orders of Division 1 and of the Commission entered on January 31, 1958, and June 15, 1959, respectively, denying the Sub 102 application. On August 9, 1960, the District Court rendered its opinion and judgment setting aside the Commission's orders as being unlawful and void, and remanding the cause to the Commission for further proceedings consistent with such opinion.

## SUMMARY OF ARGUMENT

### I

A. The Motor Carrier Act was enacted in 1935 as a part of a complete and coordinated program of legislation recommended by the Federal Coordinator of Transportation. In view of the unstable economic conditions in the motor carrier industry, "Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition * * *." *American Trucking Associations* v. *United States*, 344 U.S. 298, 312–313. Motor carrier regulation has as its underlying purpose the promotion and protection of adequate and efficient common carrier service.

B. Both before and after the 1957 amendment to section 209(b) of the Interstate Commerce Act, the standard governing the grant or denial of applications for contract carrier permits has been whether the proposed operation "will be consistent with the public interest and the national transportation policy." Prior to the passage of 1957 amendments to section 203(a)(15) (which defines the term "contract carrier" by motor vehicle) and section 209(b), the Commission had consistently attached crucial importance to the availability of adequate common carrier service in passing on applications for contract carrier permits; and, in order to foster sound economic conditions in the motor carrier industry, it had applied the principle that existing motor carriers should normally be accorded the right to handle all traffic which they can handle adequately, efficiently, and economically in the

territory served by them, as against any persons seeking to enter the field.

This practice and principle has received judicial approval. *Wilson* v. *United States,* 114 F. Supp. 814 (W.D. Mo. 1953); *Bass* v. *United States,* 163 F. Supp. 1 (W.D. Va. 1958), affirmed 358 U.S. 333, rehearing denied, 359 U.S. 956; cf., *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 90. And, in cases involving motor carrier unifications under section 5(2) of the Interstate Commerce Act, the courts have repeatedly upheld Commission decisions withholding approval of proposed unifications which would create new competitive services, on the grounds that the evidence failed to show that the resulting services would supply any needs which could not be adequately met by existing carriers. *E.g., Ratner* v. *United States,* 162 F. Supp. 518, 519 (S.D. Ill. 1957), affirmed 356 U.S. 368; *Shein* v. *United States,* 102 F. Supp. 320, 326 (D.N.J. 1951), affirmed 343 U.S. 944.

Designed to curb the destructive effects of overcompetition and, thereby, to foster sound economic conditions in transportation, we submit that the Commission practice was, and is, fully responsive to the Congressional purpose in enacting motor carrier regulation and an appropriate implementation of the National Transportation Policy.

C. The Commission's power and duty to consider a showing by a protesting common carrier that it is able and willing to provide service adequate to meet the transportation needs of the shipper supporting the contract carrier application was not impaired by the 1957 amendments.

1. When section 209(b) was amended in August of 1957, Congress retained the governing standard of consistency with the public interest and the National Transportation Policy but added the following language:

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the permit would have upon the services of the protesting carriers and [4] the effect which denying the permit would have upon the applicant and/or its shipper and [5] the changing character of that shipper's requirements.

In apparently holding that the Commission was, thereby, precluded from considering the availability and adequacy of common carrier service (R. 173, 176), the district court erred. The availability of common carrier service and its adequacy to fulfill the transportation requirements of the supporting shipper are relevant to, and implicit in, the third and fourth of the above criteria. Moreover, the retention of the same governing standard is a clear indication that the availability of adequate service is a significant factor after passage of the amendment, as it was before. Our position here finds support in the language of this Court referring to section 209(b), as amended, in *American Trucking Associations* v. *United States*, 364 U.S. 1, 13–14. It is also

supported by a recent decision of a three-judge district court in *Alexandria, Barcroft and Washington Transit Co.* v. *United States,* Civil No. 2023, E.D. Va., opinion dated July 10, 1961, judgment entered August 14, 1961, 14 Fed. Carr. Cas., par. 81, 395.

2. The impetus for the 1957 amendments was this Court's decision in *United States* v. *Contract Steel Carriers,* 350 U.S. 409 (1956), which appeared to make possible the proliferation of contract carrier services in competition with common carriers. They were initiated by the Commission to enable it to limit the number of persons whom a contract carrier may service without securing additional authority. S. Rep. No. 703, 85th Cong., 1st Sess. (1957), pp. 1, 6.

Certain specific language in the proposed legislation encountered strong opposition, notably by the Contract Carrier Conference, an appellee here. This was language which would have amended section 203(a)(15) to define contract carriage as, *inter alia,* transportation service "not provided by common carriers," and would have amended section 209(b) to require a showing, *inter alia,* "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." S. 1384, 85th Cong., 1st Sess. (1957).

Deferring to the opposition, the Commission agreed to withdraw the objectionable language in section 209(b) "because of the very difficult burden of proof that would be imposed upon applicants." *Surface Transportation—Scope of Authority—ICC,* Hearings before a Subcommittee of the Senate Interstate and Foreign Commerce Committee on S.

1384, etc., 85th Cong., 1st Sess. (1957), pp. 23–24. It also agreed to the elimination of the objectionable language in the definition as "not necessary to carry out the purpose of the bill" (*id.* at 43–44). Testimony of the spokesman for the Contract Carrier Conference shows that there was no belief that the eliminations or the addition of the five criteria in section 209(b), as finally enacted, removed the availability of adequate common carrier service as an appropriate factor for consideration by the Commission (*id.* at 299–300). The fact that the final bill had the support of the railroads, the common carriers, and the Commission is evidence that there was no intent to change the law so as to enhance the economic position of the contract carriers at the expense of common carriage. Moreover, the Senate Committee articulated the public interest in a "stable and adequate system of common carriage" in recommending passage. S. Rep. No. 703, *supra*, at 7.

Strong support for our position is found in contemporaneous legislation amending 49 U.S.C. § 1010(d) to lift a prohibition against the Commission denying a freight forwarder permit on the ground that the service will compete with existing forwarder service. The reports of the Senate and House Committees (the same committees which handled the amendments to sections 203(a)(15) and 209(b)) show their awareness of the Commission's treatment of the existence of adequate service and of its importance in motor carrier regulation. See S. Rep. No. 542, 85th Cong., 1st Sess. (1957), pp. 2–3; H.R. Rep. No. 880, pp. 3–4.

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Nowhere in the legislative history of the 1957 amendments is there disapproval or even criticism of the Commission's practice of attaching important weight to the existence of adequate service. We submit that the Commission must receive and consider affirmative evidence as to this factor when it is offered by protesting carriers.

## II

A. In stating that the Commission has entirely ignored the affirmative evidence of Boeing's specific needs, that no consideration was given to special services which in fact could not be supplied by a common carrier, and that the Commission has not made appropriate findings respecting the adequacy of the existing service to meet Boeing's distinct needs (R. 177), the district court misconceived the nature of the Commission's findings and assumed the administrative function of evaluating the evidence. We assert that the Commission's report shows on its face that it carefully considered Boeing's needs and the nature and extent of the service available from the protesting common carriers, and that it made entirely adequate findings (R. 32–33, 46–47, 49). This is demonstrated later in this brief, *infra*, at 46–52, where we also show that the findings of fact are amply supported by the record.

We further assert, and demonstrate at the same place, that the district court erred in holding (R. 170) that the Commission required the applicant to carry the burden of showing that existing services are inadequate. The Commission clearly based its con-

clusion on the affirmative showing made by the protesting common carrier, U.S.A.C., that it was authorized to serve the points involved, was experienced in the performance of the highly specialized service of transporting aircrafts and aircraft parts, and was fully able and willing to do all that was necessary to meet the shipper's requirements.

B. In the district court's view, the Commission based its determination of the effect of granting the permit on the services of protesting carriers on an improper presumption, and the Commission is only entitled to consider the diversion of substantial traffic which the protestant is presently transporting as constituting such adverse effect (R. 174, 176–177). We think that a reading of the full discussion in its report (R. 42–44, 45–46), reveals that the Commission did not reach its conclusion respecting the effect of granting the permit on protesting carriers presumptively. Rather, the report shows that the Commission's conclusion is the product of its present expert judgment as to the requirements of the public interest in the light of the provisions of the National Transportation Policy.

In our opinion, the issue here is whether the Commission abused its discretion and unlawfully administered the statute in concluding that, where existing common carrier service is adequate to meet the shipper's needs, granting the permit would be inimical to the preservation of sound economic conditions in transportation and would adversely affect the services of the protesting common carrier by withdrawing potential traffic which it should be given the oppor-

tunity to handle before an additional service is authorized. In the final analysis, the question is whether the Commission's report reflects a permissible judgment in light of the objectives of motor carrier regulation and the provisions of the National Transportation Policy. We urge that the Commission must be permitted to take a broader view of the requirements of the public interest than the district court's opinion would allow if it is to play its proper role in regulating the motor carrier industry so as to promote sound economic conditions and to develop and preserve a transportation system adequate to meet the needs of our growing economy.

## ARGUMENT

### I. THE EXISTENCE OF AN AUTHORIZED COMMON CARRIER ABLE AND WILLING TO PROVIDE SERVICE ADEQUATE TO FULFILL THE TRANSPORTATION REQUIREMENTS OF THE SUPPORTING SHIPPER IS A RELEVANT FACTOR WHICH THE COMMISSION HAS THE POWER AND DUTY TO CONSIDER IN PASSING UPON AN APPLICATION FOR A CONTRACT CARRIER PERMIT PURSUANT TO SECTION 209(B) OF THE INTERSTATE COMMERCE ACT

Both before and after the 1957 amendment to section 209(b) of the Interstate Commerce Act, 49 U.S.C. § 309(b), the standard governing the grant or denial of applications for contract carrier permits has been whether the proposed operation "will be consistent with the public interest and the national transportation policy." Prior to the enactment of the 1957 amendments, the Commission consistently attached crucial importance to the availability of adequate common carrier service. We contend below that the

availability of adequate common carrier service remains a crucial factor which the Commission has the power and duty to consider in passing upon such applications.

We show that the Commission's practice in this regard accords with the regulatory purposes of the Motor Carrier Act and is an appropriate implementation of pertinent provisions of the National Transportation Policy; that it has received judicial approval both before and after the 1957 amendments; that the availability of adequate common carrier service is relevant to specific criteria which the amendments to section 209(b) require the Commission to consider, as well as to the retained governing standard; and that the history of the 1957 amendments shows that Congress did not intend or contemplate a prohibition against Commission consideration of a showing by protesting common carriers that they are able and willing to render adequate service.

A. THE UNDERLYING PURPOSE OF THE MOTOR CARRIER ACT IS TO PROMOTE AND PROTECT ADEQUATE AND EFFICIENT COMMON CARRIER SERVICE, AND THE REGULATION OF CONTRACT CARRIERS WAS DESIGNED WITH THAT END IN VIEW

The Motor Carrier Act was enacted in 1935 as "a part of a complete and coordinated program of legislation * * * recommended by the Federal Coordinator of Transportation." S. Rep. 482, 74th Congress, 1st Sess., p. 3; H.R. Rep. 1645, 74th Congress, 1st Sess., p. 5. As noted in *American Trucking Associations* v. *United States*, 344 U.S. 298, 312–313, Congress, in 1935, had before it an industry which "was unstable economically, dominated by ease of competi-

tive entry and a fluid rate picture." And to remedy the chaotic condition, "Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition * * *."

Reference to the Report of the Federal Coordinator of Transportation (Joseph B. Eastman), which recommended regulatory legislation to Congress in 1934 (S. Doc. 152, 73rd Congress, 2d Sess.) discloses that a principal competitive evil then besetting the motor transport industry was the freedom of contract carriers, which it characterized as "so large and disturbing a factor in the trucking industry" (*id.* at 15), to seek "the more profitable business, leaving to the common carrier more generally the small freight and the responsibility of furnishing scheduled service the year around" (*id.* at 33).

The 1935 Report of the Coordinator (H. Doc. 89, 74th Congress, 1st Sess.), which resubmitted the proposed legislation, singled out the contract carriers' "tendency to demoralize or impair the system of common carriage which * * * is of prime importance to the country" (*id.* at 17). The Report recommended regulation of contract carrier activities "for the chief purpose of protecting the common carriers against unfair and demoralizing competition," and explained that "In the legislation which is here proposed, the effort has been made to follow this principle" (*ibid*). Again, testifying on behalf of the proposed legislation in February 1935, Coordinator Eastman stated (*Regulation of Interstate Motor Carriers,* Hearings

before the Subcommittee of the House Interstate and Foreign Commerce Committee, 74th Cong., 1st Sess., p. 28):

> * * * When we come to the field of transportation performed by motor vehicles, we encounter conditions which do not exist to any extent in the case of the railroads. In addition to the common carrier, those carriers who hold themselves out to serve all of the public along a particular route or in a particular district, you have the contract carriers, who do not hold themselves out to serve the public in that way but merely bargain and deal with individual shippers. And you also have many private carriers; that is to say, trucks owned by individuals or business concerns which transport their own goods and do not carry for others.
>
> So far as the regulation of these private and contract carriers is concerned, it seems to me that the important principle which should govern and which justifies any such regulation is the need for protecting the common carrier who undertakes to serve all the public. The common carrier is the one, it seems to me, that the Government ought, particularly, to foster and protect. * * *

As noted above, the Motor Carrier Act was based on the Coordinator's proposal.

In *Contracts of Contract Carriers,* 1 M.C.C. 628 (1937), the Commission (Division 5, including Commissioner Eastman) spelled out its contemporaneous

understanding of the underlying purpose of the Act, saying at pages 628–629:

> Contract carriage is a form of private carriage, as distinguished from the carriage for the general public which common carriers hold themselves out to perform. That the business of common carriers is a public calling and subject as such to public regulation has long been recognized. It has become evident, particularly in the motor-carrier field, that private carriage also is sufficiently affected with a public interest to warrant public regulation, at least to an extent. The term "contract carrier" was coined in State statutes for the regulation of motor carriers. In a number of these statutes, protection of the common carrier was expressly recited as the purpose of regulating the contract carrier. In others, this purpose appeared by necessary implication. The justification for such regulation, because of the public interest by which the contract carrier is affected, was well stated in *Stephenson* v. *Binford,* 53 Fed. (2d) 509. The court said:
>
> "We think that, if a state determines that the business of common carriage by rail and road may no longer, from the standpoint of public interest, be looked upon as a business entirely separate and distinct from that of contract carriers by road, that all of its available carriage services are so bound together and so interdependent that the public may not continue to have a safe and dependable system of transportation unless private (contract) carriers operating on the same roads with common carriers are brought under just and reasonable

> regulations, bringing their services into relation with those of common carriers thereon, no just or valid reason exists why it may not do so."
>
> This principle is inherent in the Motor Carrier Act, 1935. The underlying purpose is plainly to promote and protect adequate and efficient common-carrier service by motor vehicle in the public interest, and the regulation of contract carriers is designed and confined with that end in view. For that reason it differs from the common-carrier regulation.

Reiteration of this "underlying purpose" may be found in numerous Commission reports. *E.g., Acme Fast Freight Common Carrier Application,* 2 M.C.C. 415, 432 (1937); *Scott Bros. Collection and Delivery Service,* 4 M.C.C. 551, 559 (1938); *Keystone Transportation Co. Contract Carrier Application,* 19 M.C.C. 475, 491 (1939) and 497–498 (Commissioner Eastman concurring); *Filing of Contracts by Contract Carriers,* 20 M.C.C. 8, 11 (1939); *New England Motor Rate Bureau* v. *Lewers and McCauley,* 30 M.C.C. 651, 663 (1941); *Government Freight Contract Carriers by Motor Vehicle,* 301 I.C.C. 551, 556–557 (1957). And the same objective is evoked by judicial expressions in a similar vein. Thus, in *Motor Haulage Co.* v. *United States,* 70 F. Supp. 17 (E.D.N.Y. 1947), affirmed 331 U.S. 784, where a contract carrier attacked an order granting it a permit subject to certain limitations, the court said (p. 23):

> The Commission's action is not difficult to understand. It had classified plaintiff as a contract carrier. In line with the declared purposes of the statute [quoting in the margin the

> National Transportation Policy] it evidently wished to prevent any encroachment by the plaintiff on the field of common carriage, at least in interstate commerce, and beyond any exempt area. Since a contract carrier, unlike a common carrier, may choose its customers and, within limits, the form and character of its obligation, it should not, while enjoying those privileges, be allowed at the same time to compete in the field of common carriage. To have allowed plaintiff to do what it apparently desired would have been to sanction what the declaration of policy, quoted in the margin, called "unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

See *Doyle Transfer Co.* v. *United States,* 45 F. Supp. 691, 695 (D.D.C. 1942).

Both the Senate and House Committees on Interstate and Foreign Commerce gave explicit expression to this underlying purpose in their reports recommending passage of S. 943, amending section 218(a) of the Interstate Commerce Act, 49 U.S.C. § 318(a), to require contract carriers to file with the Commission their actual rates or charges for transportation service. S. Rep. No. 335, 85th Cong., 1st Sess., p. 2 (1957); H.R. Rep. No. 895, 85th Cong., 1st Sess., p. 2 (1957). The following language appears in both reports:

> The underlying purpose of the Motor Carrier Act (pt. II of the Interstate Commerce Act) is the promotion and protection of adequate and efficient common-carrier service by motor

vehicle in the public interest. The regulation of contract carriers was designed with that end, among others, in view.

It is significant that S. 943 became law on August 13, 1957 (71 Stat. 343)—just nine days prior to the enactment of the amendments to sections 203(a)(15) and 209(b) involved here.

B. THE COMMISSION'S CONSISTENT PRACTICE OF TREATING THE AVAILABILITY OF ADEQUATE COMMON CARRIER SERVICE AS A CRUCIAL FACTOR IN PASSING UPON APPLICATIONS FOR CONTRACT CARRIER AUTHORITY IS AN APPROPRIATE IMPLEMENTATION OF THE STANDARD OF CONSISTENCY WITH THE PUBLIC INTEREST AND THE NATIONAL TRANSPORTATION POLICY AND THE REGULATORY PURPOSE OF THE MOTOR CARRIER ACT

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. § 309(b), provides in pertinent part that a permit shall be issued to a qualified applicant if it appears "that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle * * * and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act;[4] otherwise

[4] As initially enacted in the Motor Carrier Act of 1935, the standard in section 209(b) was "consistent with the public interest and the policy declared in section 202(a) of this chapter," 49 Stat. 552. Section 202(a) was the prototype of the National Transportation Policy, containing substantially identical language but being expressly limited to motor carriers, 49 Stat. 543. When the National Transportation Policy was enacted as part of the Transportation Act of 1940, 54 Stat. 499, former section 202(a) was stricken and section 209(b) was amended to reflect the standard in its present form, 54 Stat. 919.

such application shall be denied." The National Transportation Policy, which is "the Commission's guide to the 'public interest' " (*McLean Trucking Co.* v. *United States,* 321 U.S. 67, 82) and "the yardstick by which the correctness of the Commission's actions will be measured" (*Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 88), enjoins the Commission to administer the Act so as, *inter alia,* "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 49 U.S.C., preceding §§ 1, 301, 901 and 1001.

In its report, the Commission described its practice in passing upon contract carrier applications prior to the amendments to sections 203(a)(15) and 209(b) as follows (R. 37–38):

> As seen, prior to these amendments, even where a highly specialized service was proposed, the existence of common carrier service, if any, and whether or not that service would meet the reasonable transportation needs of those supporting the application, was always considered in our determination of applications for contract carrier authority. The ability of

common carriers to compete with contract carriers for the same traffic has been recognized from the inception of motor carrier regulation in 1935, and in each contract carrier application opposed by a common carrier the burden was upon the applicant to establish that existing common carriers could not satisfactorily meet the reasonable transportation requirements of the shipper or shippers supporting the application. Early in *C. & D. Oil Co. Contract Carrier Application*, 1 M.C.C. 329, 332 an application for contract carrier authority, it was said:

"We think that, in order to foster sound economic conditions in the motor-carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territory served by them, as against any person now seeking to enter the field of motor-carrier transportation in circumstances such as are here disclosed."

For many years this principle has been followed in disposing of applications for contract carrier permits opposed by common carriers, the decisive factor being whether the available common carrier service was reasonably adequate to meet the transportation needs involved.[3]

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[3] *Arrow Transp. Contract Carrier Application*, 73 M.C.C. 261; *Refiners Transport, Inc., Extension—Missouri*, 71 M.C.C. 272; *Overland Freight Lines Inc., Extension—Kentucky*, 69 M.C.C. 143; *Guex Extension—Chicago Commercial Zone*, 67 M.C.C. 224; *Kilmer Transp. Co. Extension—Uniontown*, 53 M.C.C. 561; and *Hibbard Extension of Operations—Lime*, 47 M.C.C. 311.

This administrative construction had been followed consistently during the more than twenty years which elapsed between the passage of the Motor Carrier Act of 1935 and the passage of the 1957 amendment;[5] and it has received judicial approval.

In *Wilson* v. *United States,* 114 F. Supp. 814 (W.D. Mo. 1953), the court sustained the Commission's denial of an application for a contract carrier permit because of adequate existing common carrier service, but remanded the case to the Commission for further consideration with respect to the shipper's need for transportation of certain commodities not included within the authority of the motor carrier protestants. The court said at page 819:

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[5] The cases cited in the report are but a few of the host of like Commission decisions. While there is little point in burdening the Court with an exhaustive compilation of these cases, the following, together with the cases cited by the Commission, constitute a representative sample of the reported decisions prior to the 1957 amendments: *Smith Contract Carrier Application,* 1 M.C.C. 717 (1937); *Carr Contract Carrier Application,* 2 M.C.C. 263 (1937); *Eastern Shore Oil Co. Contract Carrier Application,* 7 M.C.C. 173 (1938); *Scott Extension of Operations,* 11 M.C.C. 227 (1939); *Daum Extension of Operations—Illinois,* 22 M.C.C. 366 (1940); *Major Contract Carrier Application,* 43 M.C.C. 795 (1944); *B. & F. Bus Service Contract Carrier Application,* 53 M.C.C. 501 (1951); *Benson Co. Extension—N.Y., N.J., and Pa.,* 66 M.C.C. 160 (1955); *Beatty Motor Express Extension—Soap to Pittsburgh, Pa.,* 66 M.C.C. 160 (1955); *Monterrey Freight Forwarding Corp. Contract Carrier Application,* 68 M.C.C. 456 (1956); *C. & E. Trucking Corp. Extension—Ice Cream Mix,* 71 M.C.C. 568 (1957); *District Hauling & Contracting Co. Extension—York, Pa.,* 72 M.C.C. 207 (1957); *Rapp Extension—Stoves,* 72 M.C.C. 446 (1957).

In its order, the Commission defined the issue which it considered should be resolved "[i]n determining whether the proposed contract-carrier operation will be consistent with the public interest, * * *." It stated the issue as follows: "We must ascertain whether the reasonable requirements of the supporting shipper may adequately be met by available carriers." In the setting of this contract-carrier proceeding, we believe the Commission properly conceived and defined the issue to be resolved, before petitioners were entitled to a certificate of convenience and necessity [sic., "permit" intended] on their application. In the past, the Commission has stated in a number of cases before it that "in order to foster a sound transportation system, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently and economically in the territory served by them as against any person now seeking to enter the field of motor carrier transportation in circumstances such as are here disclosed." *Louis Jagel & Louis A. Jagel, Extension,* 5 F.C.C. 94; *Forrest Worm & Fred Worm—Extension of Operations,* 32 M.C.C. 641. In the expertise of the Commission, we believe it to be authorized and empowered under the I.C.C. Act to so define the issue to be resolved on an application such as here involved. We accept such as being the legal issue before the Commission, and in this review proceeding shall confine our consideration as to whether that issue as resolved by the Commission is supported by substantial evidence.

In *Bass* v. *United States,* 163 F. Supp. 1 (W.D. Va. 1958), affirmed 358 U.S. 333, rehearing denied 359 U.S. 956, the court upheld the Commission's denial, prior to the 1957 amendments, of a permit to operate as a contract carrier by motor vehicle in interstate charter service saying (p. 3):

> We hold that when an application is made for a permit to furnish contract service in an area already served in that fashion by common carriers, the Commission has the duty to determine whether the existing contract service [sic., the existing common carrier charter service intended] is adequate and whether the additional proposed service will be inconsistent with the public interest and the national transportation policy.

Cf., *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 90.

This same principle has been approved by the courts in cases involving motor carrier acquisitions of control under section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), with its like standard of "consistent with the public interest." In such cases, the courts have repeatedly upheld Commission decisions withholding approval of proposed unifications of motor carriers which would create a new service competitive with existing carriers, on the ground that the evidence failed to show that the resulting service would supply any need which could not be adequately met by existing carriers. *Ratner* v. *United States,* 162 F. Supp. 518, 519 (S.D. Ill. 1957), affirmed 356 U.S. 368; *Herrin Transportation Co.* v. *United States,* 108 F. Supp. 89, 94–95 (E.D.

La. 1952), affirmed 344 U.S. 925, rehearing denied 345 U.S. 914; *Houff Transfer, Inc.* v. *United States,* 105 F. Supp. 851, 855 (W.D. Va. 1952); *Shein* v. *United States,* 102 F. Supp. 320, 326 (D.N.J. 1951), affirmed 343 U.S. 944.

As this Court pointed out in *American Trucking Associations* v. *United States,* 344 U.S. 298, 312–313, the Congressional purpose in requiring authorization for all interstate for-hire motor carrier operations was to preserve the motor carrier transportation system from the over-competition which had contributed to its instability. That the promotion and protection of adequate and efficient common carrier service was specifically purposed has been shown above at pages 15–21. The long-settled and judicially approved practice of the Commission in this area obviously was designed to curb the destructive effects of over-competition, and, thereby, to foster sound economic conditions in transportation, by preventing the promiscuous entry of carriers to perform services which were not needed because existing carriers were able and willing to perform them adequately. We submit that this was, and is, fully responsive to the Congressional purpose and a clearly appropriate implementation of the pertinent provisions of the National Transportation Policy.

C. THE 1957 AMENDMENTS DID NOT IMPAIR THE COMMISSION'S POWER AND DUTY TO CONSIDER A SHOWING BY A PROTESTING COMMON CARRIER THAT IT IS ABLE AND WILLING TO PROVIDE ADEQUATE TRANSPORTATION SERVICE

1. *The specific language of section 209(b), as amended, requires that the Commission consider such a showing*

Effective August 22, 1957, section 209(b) was amended, along with the definition of contract carrier by motor vehicle in section 203(a)(15). So far as is pertinent here, the standard in section 209(b) governing applications for contract carrier permits was retained intact, but Congress added the following language:

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the permit would have upon the services of the protesting carriers and [4] the effect which denying the permit would have upon the applicant and/or its shipper and [5] the changing character of that shipper's requirements.*

The court below appears to hold that the 1957 amendments preclude the Commission from considering the availability and adequacy of existing common carrier service. Thus, the court stated, in effect, that such consideration involves the importation of "a sixth criterion specifically rejected by Congress" (R. 173) and that "there is no longer a need to resort to

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*The numbers in brackets are not in the text but have been supplied for convenience of reference and because the district court and the Commission refer by number to the five criteria added by the 1957 amendments.

special tests beyond the language of the statute, which may have been necessary in making determinations prior to the amendments" (R. 176). We submit that in so holding the district court erred.

First, it is readily apparent from the plain language of the statute that the availability of common carrier service and its adequacy to fulfill the requirements of the supporting shipper are relevant to, indeed implicit in, the third and fourth criteria which the Commission is required to consider. Obviously, if the Commission is to properly discharge its obligation to consider "the effect which granting the permit would have upon the services of the protesting carriers," it must receive and consider proof offered by protesting carriers that they are able and willing to fulfill the transportation requirements of the shipper. As the Commission noted in its report (R. 42), "The statute does not say that the effect upon protesting contract carriers only is to be considered, and there is no reason to assume that Congress intended us to ignore the available service offered by motor common carriers or rail carriers or the effect which a grant of authority would have upon them."

Similarly, in addressing itself to the fourth criterion, the Commission properly said (R. 46), "Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements." The question of whether there is need of the shipping public for the proposed service inherently embraces the complementary question of whether existing, available service is adequate. They are but opposite sides of the same coin.

Secondly, the retention in the 1957 amendments of the identical governing standard of "consistent with the public interest and the national transportation policy" is a clear indication that the availability of adequate common carrier service continues to be a significant factor to which the Commission must give due consideration. Surely, if it were pertinent to a proper application of the standard prior to 1957, as it clearly was, it continues to be so.

Nor is it of any moment that the availability of adequate service is not in terms referred to in the statute, for it was not mentioned prior to 1957. It is enough that it is a factor implicit in, and relevant to, the statutory standard and specific criteria. For example, this Court has repeatedly approved the Commission's practice of imposing so-called "auxiliary and supplemental" restrictions in connection with common carrier certificates and contract carrier permits issued to motor carrier subsidiaries of railroads. The Court has done so despite the fact that this practice results from the importation into sections 207 and 209 of a standard articulated only in section 5(2)(b), 49 U.S.C. § 5(2)(b), pertaining to railroad acquisitions of motor carriers. See *American Trucking Associations* v. *United States*, 364 U.S. 1; *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U.S. 450; *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419; *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60.

In the *American Trucking Associations* case, *supra*, the Court held that the Commission had exceeded its statutory authority by granting to a motor carrier

subsidiary of a railroad permits to act as a contract carrier under section 209(b), as amended in 1957, since the Commission failed to impose "auxiliary and supplemental" restrictions and failed to make findings sufficient to establish the existence of "special circumstances" justifying waiver of such restrictions. In the course of its opinion, the Court clearly recognized that the need of the supporting shipper for the proposed service and its complement, the ability and willingness of existing carriers to render adequate service, are factors which the Commission may properly consider under the amended section 209(b). Responding to the contention that the Commission had found the existence of "special circumstances" justifying its failure to impose the restrictions, the Court said (pp. 13–14):

> * * * Appellees point to various findings of fact by the Commission, such as the need of General Motors for a service of the type here involved, Pacific Motor's experience and qualifications, and the unlikelihood that a significant amount of traffic would be diverted from rail to motor transportation even if the permits were granted. The difficulty with appellees' argument is that the Commission did not find that considerations of this nature constituted "special circumstances" under the *American Trucking Associations* rule, but rather viewed them simply as supporting the basic determinations which it was required to make under § 209(b) in order to issue a contract carrier permit to *any* applicant.[1] * * *

[1] Here the Court reproduced, in a footnote, section 209(b) with the 1957 amendment in italics.

> * * * There is, for example, no finding that independent contract carriers were unable or unwilling to perform the same type of service as Pacific Motor. * * *

Recently, in *Alexander, Barcroft and Washington Transit Co.* v. *United States,* Civil No. 2023, E.D. Va., opinion dated July 10, 1961, judgment entered August 14, 1961, 14 Fed. Carr. Cas., par. 81, 395, a three-judge district court[8] explicitly emphasized the importance of the availability of adequate common carrier service in setting aside a Commission order granting a permit to a contract carrier after the passage of the 1957 amendments. In that case, holding that there was a need for the service involved (charter service to the Government for the transportation of its personnel) and that it was contract carrier service which the common carrier participants were not authorized to provide, the Commission granted contract carrier permits to perform the service.[9] The court, in an opinion by Judge Bryan, after holding that the plaintiff common carriers can provide the charter service upon their existing lines and are not precluded from doing so by any provisions of the Act, stated:

> Another and overriding reason for our disagreement with the Commission is that its decision allows a contract carrier to carve a service out of the province of a common carrier. This would violate an established policy of

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[8] Chief Circuit Judge Sobeloff, Circuit Judge Haynesworth, and District Judge Bryan.

[9] *Alexandria, B. & W. Transit Co. Common Carrier Application,* 78 M.C.C. 655 (1959).

> transportation control. Where a service can be supplied either by common or contract carrier, no permit therefor should be granted the contract carrier. Vide: the definition of contract carrier in Section 203(a)(15) as omitting all potential common carriage; Sec. 209(b), as amended, directing consideration of the effect upon protesting carriers of the granting of a contract carrier permit; and also *Bass* v. *United States,* 163 F. Supp. 1, 3 (W.D. Va. 1958) aff. 358 U.S. 333.

Later in its opinion, the court added:

> The upshot of the statutory definitions and the transportation policies, noted earlier, is that contract carriage can exist only in circumstances where adequate common carriage is not found. With no issue of adequacy here, the plaintiffs must be accorded the opportunity to furnish the Government service, the contract carrier denied it.

2. *The history of the 1957 amendments shows that Congress did not intend or contemplate a prohibition against Commission consideration of such a showing*

The 1957 amendments were initiated by the Commission as an aftermath of the decision of the Court in *United States* v. *Contract Steel Carriers,* 350 U.S. 409 (1956), which appeared to open the door to the proliferation of contract carrier services in competition with common carriers, thus tending to obliterate the distinction between common and contract carriers. S. Rep. No. 703, 85th Cong., 1st Sess. (1957), p. 6; 70 I.C.C. Ann. Rep. 162–164 (1956). In order to enable the Commission to limit the number of persons

whom a contract carrier may service without securing additional authority, the Commission proposed legislation embodied in S. 1384 and H.R. 5123, 85th Cong., 1st Sess. (1957). See S. Rep. No. 703, *supra*, at 1. These bills provided, insofar as is pertinent here, that sections 203(a)(15) and 209(b) are amended: [10]

> (1) By changing paragraph (15) of section 203(a) thereof (49 U.S.C. sec. 303(a)(15)), to read as follows:
>
> "(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers.";
>
> * * * * *
>
> SEC. 2. Part II of such Act is further amended by inserting between the words "thereunder," and "that" in the second sentence of section 209(b) (49 U.S.C. 309(b)), the following: "that existing common carriers are

[10] S. 1384 is reprinted in the hearings on the bill, *Surface Transportation—Scope of Authority—I.C.C.*, Hearings before a Subcommittee of the Senate Interstate and Foreign Commerce Committee on S. 1384, etc., 85th Cong., 1st Sess. (1957), p. 6, hereafter referred to as "Hearings on S. 1384."

unwilling or unable to provide the type of service for which a need has been shown," * * *.[11]

Certain language i the proposed legislation encountered vigorous op sition, notably from the Contract Carrier Conference, an appellee in this case. Specifically, that opposition was directed to the clause "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" and the phrase in the definition of the term contract carrier by motor vehicle which states "and not provided by common carriers." The nature of the opposition is reflected in the testimony of the General Counsel of the Contract Carrier Con-

[11] The proposed section 209(b) would have read:

"Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, *that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown*, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. * * *" [Emphasis supplied.]

ference, Mr. Todd. In his prepared statement, Mr. Todd said (Hearings on S. 1384, *supra*, at 303):

> S. 1384 would amend section 209(b) in such a way as to make it necessary for any contract carrier seeking new or extended authority to prove that the service proposed was one that common carriers were unwilling or unable to perform. Such requirement would, for all practical purposes, put to an end any extension of contract carrier services, for in practically every instance where a contract carrier seeks either new or extended rights, opposing common carriers oppose the application alleging that they are willing and able to perform the proposed service. Since the state of mind of the common carriers concerning their willingness is a matter peculiarly within their own knowledge, it would be absolutely impossible for a contract carrier to ever prove to the contrary. Furthermore, it would be very difficult for a contract carrier or its supporting shipper, having no intimate knowledge of the business of opposing carriers, to prove that such carriers were unable to perform a given service.

The language in the definition was opposed for the reason that, since many common carriers provide the same type of service as do contract carriers, numerous existing contract carriers could not meet the test of performing a service "not provided by common carriers," so would lose their status as contract carriers and would have to seek certification as common carriers or go out of business. See *id.* at 295, 301–302; S. Rep. No. 703, *supra*, at 4.

The Commission deferred to the stated position of the Contract Carrier Conference and agreed to the elimination of the objectionable language for the reasons stated by its chairman. Thus, Chairman Clarke said (Hearing on S. 1384, *supra*, at 23–24):

> * * * As drafted, S. 1384 would further provide that additional permits may be issued only pending a showing that existing common carriers are unwilling or unable to render the required type of service. I wish to state at this point that because of the very difficult burden of proof that would be imposed upon applicants by the last-mentioned provision, the Commission, upon further consideration, has voted to withdraw its recommendation to amend section 209(b) in this respect. * * *

And, in a letter to the Chairman of the Senate Subcommittee, he stated (*id.* at 43–44):

> You will recall that the Commission recommended during the hearing that S. 1384 be amended by removing the requirement of a showing that existing common carriers are unwilling or unable to render the required type of service. Upon further consideration the Commission has unanimously voted also to recommend that the words "and not provided by common carriers" be deleted from line 6 on page 2 of the bill. These words are not necessary to carry out the purpose of the bill, and the deletion thereof is consistent with our previously expressed position and with the standard already provided in the bill respecting special and individualized service.

The Senate Committee recommended passage of the bill with amendments in their present form. S. Rep. No. 703, *supra*, at 1, 7–8. This amended version, as embodied in H.R. 8825, 85th Cong., 1st Sess. (1957), was the subject of a report of the House Committee on Interstate and Foreign Commerce recommending its passage. H.R. Rep. No. 970, 85th Cong., 1st Sess. The House report reflects that the bill had the support of the transportation industry (*id.* at 2) and of the Commission (*id.*, appendix). On August 22, 1957, it became law. 71 Stat. 411–412.

It is perfectly clear from the testimony of its spokesman that the Common Carrier Conference sought no change in the basic standard governing applications for contract carrier permits, and that there was no notion that the elimination of the objectionable language or the addition of the specific criteria in section 209(b) removed the availability of adequate common carrier service as an appropriate factor for consideration by the Commission. At pages 299–300 of the Hearings on S. 1384, the General Counsel of the Conference said:

> * * * Now, in addition, Mr. Chairman, to the suggestion that we thought would be helpful to the Commission we had a suggestion that we thought would be helpful to the contract carriers. As I have stated before, the contract carrier must obtain a permit from the Interstate Commerce Commission. The suggestion that we have made, both before this committee and before the Commission, would limit contract carriers rather than provide for any expansion, so that we felt that section 209(b),

the section of the law under which the Commission may grant a new contract-carrier permit, or the extension of a permit, if it is shown that the service proposed is consistent with the public interest and the national transportation policy.

*We do not suggest any change in that standard.* The only thing we have suggested in that connection is that there are certain findings that we feel the Commission should make whenever they are considering the question of the interest of the public, and we have tried to spell those out, and I have put into my statement the exact language which we have suggested, that the primary thing that we have always felt the Commission should do in those cases is *consider not only the effect of granting this authority on the common carrier—they do that in each and every case*—but to consider the effect denial will have on the contract carriers; the public interest is something to be balanced, and we think that both of those matters should be taken into consideration. * * * [Emphasis supplied.]

Certainly, there is no reason to believe that the purpose or effect of the 1957 amendments was to enhance the position of the contract carriers at the expense of common carriers by opening the door to new contract carrier service where adequate common carrier service exists. We cannot conceive that a bill having such a purport would have received the support of the railroads, the motor common carriers, and the Commission (See H.R. Rep. No. 970, *supra*, at 2)—or the support of a Senate Committee which said (S. Rep. No. 703, *supra*, at 7):

> Your committee is of the opinion that the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage, in the light of the objectives of the national transportation policy require that the bill, as amended, be passed.

Our position finds strong support in another legislative development which was current when the instant amendments were considered and enacted, namely, the 1957 amendments to Part IV of the Interstate Commerce Act dealing with freight forwarders, 49 U.S.C. § 1001–1022. Part IV requires for issuance of a permit proof that the proposed service "is or will be consistent with the public interest and the national transportation policy" 49 U.S.C. § 1010(c). As originally passed in 1942, the Act forbade denial of a permit "solely on the ground that such service will be in competition with the service subject to this part performed by any other freight forwarder or freight forwarders." 56 Stat. 291. On August 28, 1957 (six days after passage of the amendments involved in the present litigation), Congress amended 49 U.S.C. § 1010(d) to lift the stated prohibition in all instances except that in which the applicant is a corporation controlled by, or under common control with, a railroad. 71 Stat. 432.

In its report recommending enactment of the amendment, the Senate Committee on Interstate and Foreign Commerce said (S. Rep. No. 542, 85th Cong., 1st Sess. (1957), pp. 2–3):

> In the administration of other parts of the act the consideration most frequently weighed by the Commission, in determining whether a

new carrier service will be consistent with the public interest, is its probable effect upon existing carriers. The Commission repeatedly has stated that the maintenance of sound economic conditions in transportation would be jeopardized by allowing new operators to enter a field in competition with existing carriers who are furnishing adequate, efficient, and economical service. (See *Lifschultz, Extension,* 265 I.C.C. 431, 439 (1948)). Being prohibited from taking this vital factor of competition into consideration in passing upon applications for freight-forwarder permits, the Commission has felt compelled to grant permits with great liberality. This has resulted in overcrowding the forwarder field and ultimately the ill effects will be felt by the general public which depends upon freight-forwarder services.

* * * * *

It has long been recognized that in order to maintain sound economic conditions in transportation, and to insure adequate, efficient, and economical service for the public, the Interstate Commerce Commission must have effective control over the number of entrants and extent of service in any given field of transport. As early as the Transportation Act of 1920, it was provided, in section 1(18) of the act, that no carrier by railroad shall undertake any extension of its line or construct a new line of railroad unless there shall first have been obtained from the Commission a certificate that the present and future public convenience and necessity require it. The same pattern of controls was extended to common carriers by motor and water when they were brought under regulation.

Under the above-mentioned provisions of the act, the Commission has regularly and frequently denied application for new or additional operating authority upon the grounds that the service of existing carriers was adequate to meet all reasonable requirements of the shipping public, and that the institution of additional service would result in needless and uneconomic duplication of existing facilities.

However, because of the provisions of section 410(d), the Commission has felt compelled to grant freight-forwarder permits without regard to these considerations. The Commission's interpretation of the statute was spelled out in *Lifschultz Fast Freight, Extension—West and Midwest* (265 I.C.C. 431 (1948)). The Commission placed great weight on section 410(d), being of the view that the purpose of that section—

"is to assure that freight-forwarder applications shall not be denied as were motor contract carrier applications, on the ground that the existing service is adequate (265 I.C.C. 431, 440)."

See also the report of the House Committee, H.R. Rep. No. 880, pp. 3–4.

Here is positive evidence that the same House and Senate Committees which recommended passage of the amendments to sections 203(a)(15) and 209(b) were aware of the Commission's practice of giving due consideration to the existence of authorized carriers and the adequacy of their service, and of its importance in motor carrier regulation. It is hardly likely that these Committees intended to withdraw

this protection from existing common carriers while conferring it upon the freight forwarders.

In speaking of amendments to another act, it was said (*Massachusetts Bonding Co.* v. *United States*, 352 U.S. 128, 139 (dissenting opinion of Mr. Justice Frankfurter): "An amendment is not a repeal. An amendment is part of the legislation it amends. The 1947 amendments to the Federal Tort Claims Act of 1946 must be read to harmonize with the central purpose of the original act." Similarly, the present amendments must be read to harmonize with the underlying purpose of the Motor Carrier Act, the promotion and protection of adequate common carrier service; and, we submit, this objective requires that the availability and adequacy of that service be accorded appropriate weight.[12]

The amendment to section 209(b) as originally proposed would have imposed upon an applicant for a contract carrier permit the burden of proving (1) that it is fit, willing, and able, (2) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," and (3) that the proposed operation will be consistent with the public interest and the national transportation policy. The effect of the second requirement may well have been to require the applicant to negative

[12] Where a statute is concerned "with problems at once complicated and far-reaching in their repercussions," courts will examine carefully an interpretation of an amendment which would "mark the first departure from what appears to be a heretofore consistent Congressional policy." See *Guessefeldt* v. *McGrath*, 342 U.S. 308, 315, 319.

the existence of available, adequate common carrier service as a part of his affirmative or *prima facie* case. At the very least, it imposed upon him the burden of proving that existing common carriers are unable or unwilling to provide adequate service, rather than requiring common carriers opposing the application to prove that they stand ready to provide adequate service. As we have shown, *supra,* at 36–37, this requirement was objected to, and withdrawn because, and only because, of "the very difficult burden of proof" it would have imposed on the applicant.

Nowhere in the entire legislative history of the 1957 amendments is there criticism, questioning, or disapproval of the Commission's practice of attaching important weight to the existence of adequate service. In our view, the only significance which can be drawn from the deletion of the proposed language is that it left the situation respecting the availability of adequate service as it had always been. Certainly, it does not mean that the Commission must decline to receive evidence from protesting common carriers that they are authorized, able and willing to provide service adequate to meet the supporting shipper's needs. Of course, the applicant and his supporting shipper are free to rebut such evidence wherever possible. (An obvious way is by showing that the protestants have been tried and found wanting.) But where the protestants affirmatively prove the adequacy of their service, we submit that the Commission's obligation to accord that showing due weight remains unchanged.

More broadly, the decision below would make entry into contract carriage easier than entry into common carriage, in that adequacy of existing service would be an appropriate factor for the Commission to consider in acting upon applications for common carrier certificates of public convenience and necessity, but not in determining applications for contract carrier permits. Nothing in the legislative history of the 1957 amendments even faintly suggests that the Congress intended such a result. Surely, such a purpose cannot be inferred in a statutory amendment which originated in a purpose to restrict contract carriage, and in the teeth of a continuing and dominating Congressional objective to foster the common carrier system.

## II. THE COMMISSION GAVE APPROPRIATE CONSIDERATION TO THE EXISTENCE OF AN AUTHORIZED COMMON CARRIER ABLE AND WILLING TO PROVIDE ADEQUATE SERVICE IN PASSING UPON THE INSTANT APPLICATION

### A. THE COMMISSION PROPERLY CONCLUDED THAT THE PROTESTING COMMON CARRIER IS FULLY ABLE AND WILLING TO MEET THE SUPPORTING SHIPPER'S NEEDS AND THAT, IN VIEW OF THE ADEQUACY OF EXISTING COMMON CARRIER SERVICE, THE SHIPPER WOULD NOT BE MATERIALLY AFFECTED BY A DENIAL OF THE PERMIT

Speaking of the Commission's conclusion with respect to the effect which denying the permit would have upon the supporting shipper, the district court said (R. 177):

> * * * And in this connection it should be noted that in reaching the conclusion that the shipper will suffer no adverse effect because U.S.A.C. is willing and able to perform, the Commission has entirely ignored the affirma-

> tive evidence of Boeing's specific need for a contract type service and the special problems it faces. No consideration was given to the special services which in fact could not be supplied by a common carrier. The Commission has neatly solved the problem with its finding that common carrier service is "adequate". Inasmuch as the "willing and able" test at times seems indistinguishable from, and in the eyes of the Commission, synonymous with, the "adequacy test", a finding by the Commission that existing common carrier service is "adequate to meet the reasonable transportation needs" of the shipper fails to take into account that the new test under Section 203(a)(15) is whether the service is "designed to meet the *distinct need* of each individual customer." While existing *specialized services* of common carriers may very well be adequate to supply the shipper's *"reasonable transportation needs"*, that existing service may not in fact meet the *distinct* or *specific* need of the supporting shipper.

In so stating, we submit, the court misconceived the nature of the Commission's findings and usurped the administrative function of evaluating the evidence.[13]

In its report, the Commission said (R. 46–47):

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[13] *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 488; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241; *United States* v. *Pan-American Petroleum Corp.*, 304 U.S. 156, 158; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541, 547–548.

If the court's language is intended to express the view that common carriers may not lawfully provide specialized services to meet a shipper's distinct needs (see the court's statement at R. 175), we submit that this ignores a lengthy history of

Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. U.S.A.C., by confining its activities almost entirely to serving the aircraft industry, is presently furnishing a highly specialized service to numerous other aircraft manufacturers whose requirements are similar, if not the same, as those of the supporting shippers. In fact, its ability to obtain business depends on its ability to satisfy the needs of shippers having transportation requirements similar to those of these supporting shippers, and it is dependent upon the very kind of traffic as is here considered for the continuance of its operations. In view of our determination that a common carrier may furnish a specialized service provided it offers such service to the public generally, there is no question but that U.S.A.C. holds the operating authority necessary to furnish the needed service. Its drivers have security clearance; it has equipment suitable for transporting aircraft assemblies, parts, and equipment; and, if the supporting shippers will furnish it with specifications for the fixtures necessary to handle their particular traffic, it will modify as many pieces of its equipment as is necessary to provide adequate service. Furthermore, it is willing to dedicate certain of its trailers to the exclusive use of each of

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specialization within the common carrier industry, as exemplified by such specialists as haulers of automobiles, heavy haulers, explosives transporters, tank truck operators, and the like. We respectfully refer the Court to the accurate summary of this development in the Commission's report (R. 36–37).

the shippers. In this connection, it is noted that its tariff contains a provision whereby it may exercise control over the type of equipment to be used in a particular movement. This is a provision frequently found in tariffs published by common carriers; however, in view of this protestant's expressed willingness to modify its equipment to fit the shippers' specifications and to assign such equipment to the exclusive use of each of the shippers, there does not appear to be anything in its tariff which would prevent it from rendering a satisfactory service.

Considering the highly specialized service in transporting traffic similar to that here considered which U.S.A.C. is presently rendering to numerous manufacturers and suppliers in the aircraft industry, its ability and willingness to provide the service which the supporting shippers require, and the fact that, with respect to the instant traffic, neither shipper has attempted to avail itself of U.S.A.C.'s services, we cannot find that existing service has been shown to be inadequate. Plainly, there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C. To the contrary the very business of U.S.A.C. is the transportation of the type of traffic involved.

As a consequence, the Commission concluded that "U.S.A.C. is fully able to meet the shippers' needs" and that "in view of the adequacy of existing common carrier service the supporting shippers would not

be materially affected by a denial of the applications" (R. 49).

In an apparent reference to the paragraph last-quoted above, the district court said that the Commission goes beyond the language and scope of the statute when it assumes and requires (1) that the applicant carries the burden of showing that existing services are inadequate and (2) that the expressed willingness and ability of opposing carriers, together with absence of proof that such service has been tried and found wanting *ipso facto* vitiates a contention that the service is needed by the shipper (R. 170). We assert that the court has inaccurately characterized what the Commission did. It affirmatively appeared from evidence adduced by the protesting carrier, U.S.A.C., that it was authorized to serve the points involved, was performing a highly specialized service in transporting aircraft parts, and was able and willing to do all that was necessary to meet the shipper's requirements. We think it clear that the Commission's determination was based on the totality of this showing and not upon an improper imposition of a burden of proof on the applicant; and that, when read in context, the statement "we cannot find that existing service has been shown to be inadequate" merely means that neither applicant nor his supporting shipper has succeeded in rebutting this proof.

The essential facts respecting the service required by the supporting shipper and the service which the protesting common carriers are able and willing to

provide are summarized in the Commission's report as follows (R. 32–33: [14]

> Boeing Airplane Company, hereinafter called Boeing, supports the Sub-No. 102 application. A manufacturer at Indianapolis supplies Boeing with landing-gear bulkheads which it installs in planes at its Wichita assembly plant (R. 84). The dimensions of the forward and aft bulkheads are 128 by 90 by 42 inches and 122 by 181 by 24 inches, and they weigh 1,380 and 1,340 pounds, respectively (R. 85). The service needed as regards the movement of landing-gear bulkheads are similar to those of North American in that these articles, because of their nature, must be transported in specially designed, closed equipment, with their delivery being made in accordance with Boeing's production schedule (R. 69–70, 85–86). While applicant must deadhead its equipment 700 miles from Wichita to Indianapolis to perform the proposed service, (R. 79, 103) it has sufficient advance notice to schedule the movement (R. 102). Prior to the use of its service under appropriate temporary authority, the shipper used rail service, but the necessity of constructing special containers made the cost of this service prohibitive (R. 87–88). During a 4-month period applicant transported about four shipments a month in one of its trailers equipped with special fixtures for transporting this particular shipper's traffic and assigned to the exclusive use of shipper (R. 69, 73, 76, 80). This service has been highly satisfactory. Al-

[14] We have interpolated record references to the supporting evidence at the appropriate places.

though the shipper knew that U.S.A.C. was authorized to perform the proposed service, (R. 101, 103, 104) it did not request that carrier to supply equipment for the reasons that U.S.A.C.'s tariff provides that it can exercise control over the type of equipment that will be used for any particular shipper, and, in 1953, it had unsatisfactory experiences in the use U.S.A.C.'s service (R. 101, 105).

U.S.A.C. holds certificates authorizing it, insofar as here pertinent, to transport, over irregular routes, aircraft parts and equipment, crated or uncrated, (1) between Garland and Grand Prairie, on the one hand, and, on the other, Columbus, and (2) between Indianapolis and Wichita (Ex. 16, R. 148, 150; R. 111–112). Approximately 60 percent of its traffic consists of aircraft parts other than engines and the remainder consists principally of aircraft engines.[15] As a result of having served the aircraft industry almost exclusively over a period of years, it is accustomed to modifying its equipment to meet the specific requirements of particular aircraft manufacturers, and it is able to tailor its service to fit the production schedules established by its customers (R. 112–113, 115–116, 118; Ex. 16, R. 149). It maintains, among others, terminals at Dallas, Tex.

[15] Support for this statement appears at pages 102 and 121 of the transcript in the Commission's Docket No. MC–11185 (Sub-No. 100), the companion docket respecting J-T Transport's application for authority to serve North American Aviation, Inc., which is also embraced in the Commission's report. Since no review was sought of the Commission's denial of this authority, the record in Sub-No. 100 was not introduced in the district court and is not before this Court.

approximately 15 miles from Garland and Grand Prairie, and at Topeka, Kans., and Indianapolis (R. 112). It operates 173 tractors and 225 trailers (Ex. 15, R. 147), some of which, if fitted to the shippers' specifications, would be suitable for transporting the considered traffic (R. 112–113). Its drivers are required to have security clearance (R. 118). If tendered the considered traffic, it would modify and make available to the shippers whatever equipment is necessary to meet their transportation requirements (R. 112–113, 118).

Two so-called heavy haulers, both common carriers, submitted evidence in opposition to the Sub-No. 102 application. Belger Cartage Service, Inc., holds authority to operate between points in Missouri and Kansas (R. 125) and Daniel Hamm Drayage Company is authorized to operate between points in Indiana and Missouri (R. 131). By interlining at Kansas City, they purport to be able to handle aircraft landing gear bulkheads to Boeing's satisfaction (R. 126–129, 132–134, 137). There is also interline rail service from Indianapolis to Wichita (R. 138).

We think it clear from the Commission's report and the record that the Commission's findings are entirely adequate, responsive to the statutory test, and amply supported by the evidence. Certainly, it cannot be successfully maintained that the Commission's conclusion here lacks sufficient explication or is not supported by substantial evidence.

B. THE COMMISSION PROPERLY CONCLUDED THAT GRANTING THE PERMIT WOULD BE INIMICAL TO THE PRESERVATION OF SOUND ECONOMIC CONDITIONS IN TRANSPORTATION AND WOULD ADVERSELY AFFECT THE SERVICES OF THE PROTESTING COMMON CARRIER BY WITHDRAWING POTENTIAL TRAFFIC WHICH IT CAN HANDLE ADEQUATELY AND SHOULD BE GIVEN THE OPPORTUNITY TO HANDLE BEFORE AN ADDITIONAL SERVICE IS AUTHORIZED

In flatly rejecting the Commission's conclusion and rationale respecting the third criterion in section 209(b), "the effect which granting the permits would have upon the services of the protesting carriers," the district court said (R. 174):

> Consideration of the effect on the services of protesting carriers does not contemplate consideration of the mere existence or availability of a protesting carrier, but rather what effect, if any, granting a permit would have on the existing services of that carrier. The Commission bases its decision here on the presumption that if an existing common carrier is able and willing to perform services for the shipper or, stated alternatively, that existing common carrier service is adequate, the effect on existing protesting common carrier services is adverse. Thus, since the Commission aids itself by a presumption, under this interpretation the "very difficult burden of proof" remains with the applicant and proposed shipper to negate the adverse effect on existing common carriers. The effect of this is to inject precisely the standard which was deleted by Congress at the time of enactment of the new section.
>
> The consideration of the effect on the services of protesting carriers is designed to afford a measure of protection for those carriers.

> This criterion does not contemplate consideration of the mere existence or availability of a protesting carrier, but rather what effect, if any, granting of a permit would have on the services of the carrier. If the protesting carrier was actually serving a shipper and participating in the traffic involved, the granting of a permit would divert traffic from the protesting carrier, and if this diversion would cause the services of the protesting carrier to be adversely affected to a material degree, this element certainly should be considered by the Commission. Where, however, the protesting carrier is not participating in the traffic involved, there can be no diversion of traffic and hence ordinarily there would be no adverse effect on the services of the protesting carrier.

And it further emphasized the extent of its disagreement with the Commission by saying (R. 176–177):

> Since the order denying the application must be vacated, we observe further that apart from the fact that a finding of an adverse effect upon U.S.A.C. would not in and of itself justify a denial of the application, there is in this record no substantial evidence to support the Commission's finding that the issuance of the permit would adversely affect the *services* of U.S.A.C. which had never handled or transported the commodities in question. Since U.S.A.C. is not participating in the traffic and never has been, the permit cannot possibly divert such traffic. There is no evidence in the record that if the permit is denied, U.S.A.C. or any other existing carrier will ever be permitted to serve the needs of Boeing. * * *

Initially, we point out with respect to the court's last statement above that neither is there a scintilla of evidence that Boeing had any intention to institute private carriage to meet its transportation needs should the contract carrier permit be denied. Moreover, since U.S.A.C. is in a position to adequately handle the traffic and is apparently the available carrier best equipped to do so, it is likely that it will get the traffic. Apart from this and even if we were to assume a stated intention to institute private carriage, such an assertion should not be a material consideration. If it were, control over the issuance of motor carrier authority would effectively be taken from the Commission and delivered into the hands of the applicant and his supporting shipper by the simple expedient of having the shipper declare that a grant would have no impact on the services of existing carriers since they will not be utilized in any event. The soundness of this observation was at least implicitly recognized by this Court in *American Trucking Associations* v. *United States,* 364 U.S. 1, 18, when it said:

> • • • And surely the statement by General Motors that it would not in any event give the business to any appellant cannot derive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. • • •

The point is that, while a shipper is always perfectly free to transport its own goods, to the extent that public transportation will be utilized the able and willing existing carriers will get the traffic.

We have no quarrel with the accuracy of the district court's observation (R. 176) that "a finding of an adverse effect upon U.S.A.C. would not in and of itself justify a denial of the application." But, if intended as an appraisal of what the Commission has done, it is deficient, for the Commission has not denied the application solely on the basis of such finding. It has made the required findings as to each of the specific criteria and the statutory standard. Importantly, it has carefully weighed the requirements of the shipper against the available service, and has found that there is no need for the applicant's proposed service since the existing service is adequate. We would, of course, agree that were the protesting carriers unable or unwilling to provide service adequate to meet the shipper's needs, a proposed service which would do so should be authorized without regard to the effect on the existing carriers.

While the Commission did indeed say at one place in its report that "[t]here is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of potential traffic" (R. 42), we think a reading of the Commission's full discussion reveals that it did not reach its conclusion respecting the effect on existing carriers presumptively, as the opinion of the district court suggests (R. 174). The report shows instead that the Commission's conclusion is the product of its present expert judgment as to

the requirements of the public interest as that term is illuminated by the provisions of the National Transportation Policy—a judgment which "carries a presumption of validity," *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602.

Thus, the Commission said (R. 42–43):

> Section 209(b) as it now reads sets out certain criteria which we must consider in determining whether a grant of authority will be consistent with the public interest and the national transportation policy. Most of these points may be best discussed in relation to the peculiar facts of the instant applications, but it should be noted here that one of the factors to be considered is the effect which a grant of authority would have upon the services of protesting carriers. The statute does not say that the effect upon protesting contract carriers only is to be considered, and there is no reason to assume that Congress intended us to ignore the available service offered by motor common carriers or rail carriers or the effect which a grant of authority would have upon them. The question presented, then, is how we are to determine whether a grant of authority will adversely affect the service of a protestant. It might be argued that where, as here, a protestant is not now enjoying the involved traffic, it cannot be adversely affected by a grant of authority. However, we believe that our past holdings that existing carriers are entitled to transport all the traffic which they can economically and efficiently handle before additional authority is granted are equally valid today as they were prior to the 1957 amendments to the act. There

> is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of *potential* traffic, even if they may not have handled it before. Any doubt that we might have that existing carriers generally should be afforded an opportunity to handle available traffic before a new service is authorized is disspelled by the specific wording of section 209(b), and a number of applications for contract carrier authority have, in fact, been denied since the passage of the 1957 amendment in spite of the fact that the only opposition was that of common carriers. [Citing in a footnote certain of its post-amendment decisions.]

That in speaking of "the specific wording of section 209(b)," the Commission meant the standard of "consistent with the public interest and the national transportation policy," as well as the third criterion, seems clear from its further discussion. After quoting a portion of the National Transportation Policy, the Commission went on to say (R. 43–44):

> In *Schaffer Transportation Company* v. *United States*, 355 U.S. 83, 88, the Supreme Court said: "[T]his Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured." The Congressional mandate could not be carried out if we were to close our eyes to any matter which might affect the good of the national transportation system as a whole. Surely sound economic conditions in the transportation industry could not be maintained if common carriers, who have the obligation of providing service to the public at large within the scope

of their authorities, were faced with a situation in which available traffic could be, as it were, withdrawn from general circulation and given to contract carriers, without these common carriers being given the opportunity to make an effective showing of their willingness and ability to provide needed service.

Again, the Commission said (R. 45–46):

> The requirement of section 209(b) that we consider the effect which a grant of authority would have upon the services of protesting carriers has, we believe, been adequately discussed. It is sufficient at this point to say that, in view of our finding herein that U.S.A.C. is in a position to provide any service that is needed, we conclude that a grant of authority to applicant would have an adverse effect upon that protestant. It may be worthy of repeating, however, that in the economic regulation of motor transportation through grants of operating authority, the principle that existing carriers should be accorded the opportunity to transport available traffic that they can handle adequately, efficiently, and economically in the territories they serve before a competitive service is authorized is sound doctrine, in the public interest, and in the furtherance of the national transportation policy, whether the application is one for common or contract carrier authority.

Finally, it concluded that "U.S.A.C. is fully able to meet the shippers' needs and would be adversely affected by a grant of either application" and that "the potential loss of traffic to U.S.A.C. outweighs any detriment to applicant" (R. 49–50).

In our opinion, the issue here is whether the Commission abused its discretion and unlawfully administered the statute in concluding that, where existing common carrier service is adequate to meet the shipper's transportation needs, granting the permit would be inimical to the preservation of sound economic conditions in transportation and would adversely affect the services of the protesting common carrier by withdrawing potential traffic which the protestant can handle adequately and should be given the opportunity to handle before an additional service is authorized. In Chapter I of this brief, we have shown that the Congressional purpose in requiring authorization for all interstate for-hire motor carrier operations was to promote stability in the motor carrier transportation system by preserving it from over-competition, that the promotion and protection of adequate and efficient common carriage is a specific objective, and that these objectives are reflected in the National Transportation Policy's injunction that the Act be administered to foster sound economic conditions in transportation to the end of developing and preserving an adequate national transportation system. In the final analysis, the question is, we think, whether the Commission's report as excerpted above reflects a permissible judgment to these ends. In this connection, we note that this Court has repeatedly expressed the view that "the Commission possesses a 'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service." *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 88; *United*

*States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 535–536; *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U.S. 236, 241; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60. While these cases are concerned with applications for common carrier authority, the principle should be equally applicable where contract carrier permits are sought.

We urge that the Commission should be permitted to take a broader view of the requirements of the public interest than the district court's opinion would allow. Specifically, the phrase "services of protesting carriers" must be read broadly to encompass generally the continuing ability of the existing carriers to serve potential, as well as existing, customers. It cannot be ignored that ours is a growing economy and the regulated carriers must be able to provide service adequate to meet the needs of tomorrow as well as today. As the Court said in another context, "Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." *Board of Trade* v. *United States,* 314 U.S. 534, 546. If the Commission's conclusion, that withdrawal of potential traffic constitutes an adverse effect and would not be consonant with the maintenance of sound economic conditions in transportation, be criticized as predictive, we submit that it is the prediction of an expert body with long experience in these matters. And prediction is frequently a necessary element of administrative judgment. Cf., *United States* v. *Detroit & Cleveland Navigation Co., supra,* at 241.

Apart from the generalized observations above, it should be noted that the protesting common carrier here experiences an imbalance of operations, causing vehicles to be "deadheaded" empty from the origin terminal at Indianapolis (R. 116)—a situation which would be alleviated were it given the opportunity to handle the traffic. Moreover, if the Commission is confined to consideration of the diversion of traffic which the protesting carrier is presently transporting, all newly-developed aircraft parts could be siphoned off by newly-authorized carriers on the ground that there would be no diversion from the existing carriers. The present case involves landing gear bulkheads for the B–52 bomber (R. 84). But the high rate of obsolescence in the aircraft industry constantly results in the production of new planes, parts, and accessories—hence, the creation of new traffic.

We submit that in holding that the permissible scope of the Commission's inquiry is confined to whether a grant of authority would divert substantial traffic presently being transported by the protesting carrier, the district court took an unrealistic view and one unduly restrictive of the Commission's power and duty under the statute. We think it clear that section 209(b), in requiring the Commission to consider both the effect of the grant of a permit upon the services of protesting carriers and the effect of a denial upon the applicant, cannot be read as requiring consideration of the potential loss of traffic to the appli-

cant [16] and prohibiting consideration of the potential loss to existing carriers.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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SEPTEMBER 1961.

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[16] Although the applicant has been transporting the traffic under temporary authority pursuant to section 210a(a), 49 U.S.C. § 310a(a), it is still potential traffic, as that section provides that such authority "shall create no presumption that corresponding permanent authority will be granted thereafter." The Commission's consideration of the effect of a denial on the applicant (R. 46) was not criticized by the district court and is, we submit, clearly proper.

# APPENDIX

## Statutes Involved

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding Sections 1, 301, 901, and 1001, provides as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services; without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85–163, 85th Cong., S. 1384, provides as follows:

Sec. 203. (a) As used in this part—

* * * * *

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411–12, Public Law 85–163, 85th Cong., S. 1384, provides as follows:

Sec. 209

* * * * *

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly

to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204 (a) (2) and (6): *Provided*, That within the scope of the permit and any terms, conditions, or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its

business may require: *Provided further,* That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.

U.S. GOVERNMENT PRINTING OFFICE: 1961